No. 42683-8--II

COURT OF APPEALS, DIVISION TWO,

OF THE STATE OF WASHINGTON

CLALLAM COUNTY No. 11-1-00048-5

STATE OF WASHINGTON,

Respondent/Plaintiff,

vs.

DYLAN VALIN,

Appellant/Defendant.

BRIEF OF RESPONDENT

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ISSUE TWO

If a defendant is charged with seven separate crimes, many of which are class B felonies, is there any evidence that would support a finding that the defendant was prejudiced by counsel's performance?

STATEMENT OF FACTS

Dylan Scott Valin was charged by a third amended information with three counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Second Degree, Rape of a Child in the Third Degree, Harassment, and Cyberstalking (CP 23-26).

Trial began on August 29, 2011 (RP 8/29/2011 3). Mr. Valin was represented by two attorneys, Mr. Gasnick and Mr. Stalker (RP 8/29/2011 4). They asked that Mr. Valin be permitted to sit between them; "DOC" indicated "that's fine." (RP 8/29/2011 5). Before the jury pool was brought into court for *voir dire,* the Court spoke to Mr. Valin:

> "Couple things, Mr. Valin, you're obviously in custody, we don't want the jury to be necessarily aware of that fact. They don't know if this officer's in here all the time or not, so I want you to stay at the table and don't leave the court – if we take a recess or any other reason, wait until the jury's out of the courtroom and then you can go with the officer. So, just cool your heals [sic] until we tell you to leave, all right?"

(RP 8/29/2011 6). Mr. Valin answered "All right." (RP 8/29/2011 6).

Mr. Valin chose to testify in his own behalf (RP 8/31/2011 19). While he was still seated at the defense table, the Court sent the jury out (RP 8/29/2011 18). After the jury left the room, the Court spoke again to Mr. Valin:

> Okay, so I just wanted to make sure that the jury was out when Mr. Valin came up because he's go[t] the brace on his leg, so I wanted to have you come on up and take a seat. And when you're done

> with your testimony, Mr. Valin, I want you to just stay seated and I'm going to excuse the jury again so they don't get any indication you've got a device on your leg, okay.

(RP 8/29/2011 18-9).

When Mr. Valin finished testifying, the Court sent the jury out again so Mr. Valin could return to his seat. (RP 8/29/2011 38). The jury found Mr. Valin guilty of three counts of rape of a child in the third degree and two counts of child molestation in the third degree (CP 6). The jury returned a "not guilty" verdict to two counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Second Degree, and two counts of Rape of a Child in the Third Degree (CP 44, 42, 40, 38, 36, 34).

ARGUMENT

SHACKLING

ISSUE ONE

When the record contains no evidence a juror ever saw the defendant's leg restraint and also shows the efforts made by the Court to ensure no one saw the leg restraint, is any error harmless in failing to conduct a hearing before placing a restraint on a prisoner?

A. The State concedes the Court did not conduct a hearing before permitting the jail to bring Mr. Valin to the courtroom with a leg restraint.

Mr. Valin contends the Court erred when it permitted the jail personnel to bring him to court with a leg restraint. He is correct that there are no findings to establish that he posed an imminent risk of escape,

intended to injure anyone or could not behave in an orderly manner while in the courtroom. The actual trial record shows Mr. Valin was respectful and courteous throughout the trial.

B. The error is harmless because nothing in the record shows that any juror saw the leg restraint because of the Court's care in keeping the defendant from moving about.

The actual trial record, however, shows the Court ensured no juror saw Mr. Valin's leg restraint. Mr. Valin was seated before the jury came in and seated when they left. He was seated in the witness chair when the jury was out. He was directed to remain in the witness chair until the jury was excused after this testimony.

The record does not show that any juror observed Mr. Valin's leg restraint. Without anything in the record to establish a juror observed the leg restraint, there is nothing to address on appeal. The burden is on Mr. Valin to show the shackling had a substantial or injurious effect or influence on the jury's verdict. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). Every case cited by Mr. Valin involved extensive shackling of the defendant. *State v. Hartzog*, 96 Wn.2d 383, 397, 635 P.2d 694 (1981) (standing order requiring shackling, which caused defendant and his witnesses to choose not to appear before the jury); *State v. Finch*, 137 Wn.2d 792, 865-66, 975 P.2d 967 (1999) (leg shackles and

handcuffs on a prisoner charged with two counts of aggravated first degree murder). In each case, shackling, or the threat of shacking, impacted the defendant's appearance in court, ability to appear in court, or ability to appear before the jury just like any other defendant.

Second, even if leg restraints are used without a prior hearing, the record must reflect that the shackling in some manner impacted the trial, especially when the record both shows the efforts of the trial court to hide the leg restraint and does not contain any indication a juror could have seen or actually observed the restraint. *State v. Clark*, 143 Wn.2d 731, 777, 24 P.3d 1006 (2001), cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001), held shackling could be harmless error when there was no possibility the jury would have known the defendant was shackled:

> The trial court made sure Clark was not moved in or out of the room in the presence of the jury, both counsel tables had protective skits, the shackles were taped to eliminate any noise, and the jury never saw [the defendant] in motion during the guilt phase.

Id. at 777. The Supreme Court then held that Mr. Clark was not prejudiced by being shackled and the error harmless beyond a reasonable doubt. In Mr. Valin's case, the Court made sure he was not moved in or out of the room (or about the room) in the presence of the jury and the leg restraint was not visible by glance.

In both *Hartzog* and *Clark*, the real question was whether the record showed the defendant was denied an opportunity to appear like any other defendant, with nothing to indicate he or she is particularly dangerous and violent.[1] Where the Court permits the jail to use a leg or knee restraint, but takes extra precaution to ensure the jury has no opportunity to see the restraint, the burden must shift to the defendant to show he or she was denied the right to appear like every other defendant. Otherwise, the defendant cannot establish prejudice. There was no prejudice to Mr. Valin in this case.

Finch also held at 137 Wn.2d 845 that shackles are inappropriate if they interfere with a defendant's ability to assist his counsel during trial, interfere with his right to testify during trial, or offends the dignity of the judicial process. Mr. Valin wore an unobtrusive leg band under his clothes. Mr. Valin sat at the counsel table between his two attorneys. When it came time for him to testify, the jury was excused so he could get into the witness chair. He did not move from the witness chair until after the jury retired. Mr. Valin appeared in court like every other defendant, except he had a hidden restraint that was not visible, did not interfere with

[1] State v. Hartzog, 96 Wn.2d at 703: "Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial."

his defense. Because Mr Valin appeared just like every other defendant, there was nothing to offend the dignity of the Court.

ISSUE TWO

INEFFECTIVE ASSISTANCE OF COUNSEL

If a defendant is charged with seven separate crimes, many of which are class B felonies, is there any evidence that would support a finding that the defendant was prejudiced by counsel's performance?

To prove ineffective assistance of counsel, Mr. Valin must show defense counsel's representation was deficient and prejudicial. *State v. Hendrickson,* 129 Wn.2d 61, 917 P.2d 563 (1996), citing to *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. *State v. Neff,* 163 Wn.2d 453, 465, 181 P.3d 819, 826 (2008); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance and the defendant bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. *In re the Detention of Moore,* 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).

A claim of ineffective assistance of counsel, when no claim of error was made below, must involve a manifest error, an error truly of constitutional magnitude. *State v. McFarland, supra* at 333. The claim of

error must show the alleged error actually affected the defendant's rights. *Id.* "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.,* citing to *State v. Riley,* 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

In other words, the appellant must show *in the record* where counsel was deficient in his / her performance *and* that the deficiency created actually prejudice to defendant. *State v. Clark, supra,* 143 Wn.2d at 774-75 (shackling without judicial inquiry during the guilt phase is constitutional error and therefore presumptively prejudicial, but presumption of prejudice can be overcome on appeal by providing a record on appeal that no prejudice occurred). In Mr. Valin's case, the record shows the same meticulous attitude by the trial court as the trial court showed in *Clark.* The Court in Mr. Valin's case made sure Mr. Valin did not move from the counsel table when jurors could observe him walking. Further, Mr. Valin had two counsel and he was seated between them, so the leg restraint did not interfere with his ability to assist counsel in his defense. Finally, the record does not show the leg restraint was visible, thus ensuring the decorum of the court. If trial counsel committed error, it was so minimal that nothing in the record shows their performance in any manner affected Mr. Valin.

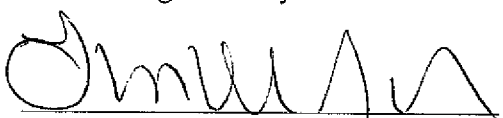
In Mr. Valin's case, it is even more difficult to postulate he was prejudiced by the leg restraint. He was charged with three counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Second Degree, Rape of a Child in the Third Degree, Harassment and Cyberstalking (CP 23-26). The jury acquitted him of two counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Second Degree, and two counts of Rape of a Child in the Third Degree (CP 44, 42, 40, 38, 36, 34). Instead, he was convicted of three counts of Rape of a Child in the Third Degree and two counts of Child Molestation in the Third Degree (CP 43, 41, 39, 37, 35). The jury obviously did not accept that the victim was younger than 14.[2] With these results, it is clear the jury showed no rancor or animosity to Mr. Valin that could be traced to his leg restraint. There is no prejudice.

CONCLUSION

The Court should affirm the convictions.

Respectfully submitted this 17 day of May, 2012.

DEBORAH KELLY
Prosecuting Attorney



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[2] Harassment and Cyberstalking charges were later dismissed. (CP 33).

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Lewis M. Schrawyer, #12202

CLALLAM COUNTY PROSECUTOR

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Case Name: State v. Dylan Scott Valin

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